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PROGRESS OF THE LAW.

As Marked by Decisions Selected from the Advance Reports.

ADMIRALTY.

Marine Executory Contract, Enforcement In Rem

The last contribution to the discussion which has been carried on for at least fifty years, as to whether an executory contract can be enforced *in rem*, is the case of the *Eugene*, 83 Fed. 222 (D. C., N. D. Wash.). One of the first cases on this point, and certainly the chief authority to the effect that executory contracts bind the vessel, was the *Pacific*, 1 Blatchford, 569 (1850). In that case a miner bound for California was allowed to detain the ship with all the passengers on board, because the ship-owners had broken their contract with him by receiving more than the specified number of persons for carriage. The opinion of Mr. Justice Nelson then delivered has been referred to in every case since that time, and his views have been endorsed or disapproved many times. It is rather curious that, in the 1898, this same question should be presented to the court of admiralty, and again in connection with persons bound for the mines.

In the *Eugene* (*supra*) a libel was filed for breach of contract to carry from Seattle via. St. Michaels to Dawson City. The Portland & Alaska Trading & Transportation Company, claimants of the "Eugene," had issued tickets for passage on the steamer "Bristol" from Seattle to St. Michaels, and thence on board the steamer "Eugene" to Dawson City. The breach alleged was the failure of the "Eugene" to go to St. Michaels to receive the libellants as agreed. Hanford, J., reviewed the cases and then said: "According to the authorities, it is not the making of a contract, nor the payment of the consideration therefor, which renders the vessel liable. The lien upon which the right to proceed depends, does not attach until the goods or passengers have been placed within the care and under the control of the ship's master." Thus the learned judge sides with the later opinions on this subject and expresses what may now be considered the correct view.

Maritime Liens, Repairs

An interesting opinion is that by Bradford, J., in the *Ella*, 84 Fed. 471 (D. C., D. Del). Repairs were made upon a vessel in a foreign port at the order of her owner, and a note was given by him to secure the payment of the charges of the materialman. Upon the first point the learned judge said: "The maritime law does not recognize any lien on a vessel for repairs furnished in a

ADMIRALTY (Continued).

foreign port, on the direct order of the owner in person, unless there is an agreement, express or implied, for a lien. . . . If there be a common understanding between the repairer and the owner that the furnishing of necessary repairs is to proceed upon the basis of a lien, or of extension of credit to the ship as well as to the owner or master, there is an implied contract for a lien." The opinion contains a most excellent discussion of the principles governing the implied hypothecation of a ship. As to the second point raised by the above facts, the court said: "The mere acceptance, by a person entitled to a maritime lien for repairs, of a promissory note of the owner of the ship repaired, does not defeat the lien. There is a presumption that the note is taken only as collateral security; and this presumption continues, unless it affirmatively appears that the note was taken with an intention that it should extinguish the lien." This quotation has been given because it contains such a good statement of the law. The principle is, of course, well settled.

Maritime Liens, Lien on Whole Fleet

A libel for supplies, filed against a fleet of boats composing a dredging plant—a tug, a dredge, several scows, water boats, etc.—shows a peculiar train of thought in the mind of counsel. As stated by Benedict, J., "the theory of the libel seems to be that this fleet of boats should be treated as one vessel; and the supplies in question having been bought for the fleet (although used on some of the vessels and not on others), this gives the libellant a lien therefor upon all the vessels jointly," Such a proposition, it was held, could not be maintained: *The Knickerbocker*, 83 Fed. 843 (D. C., E. D. of N. Y.).

Maritime Liens, Waiver

The same learned judge, in a case that is also very late in being reported, *The Angler*, 82 Fed. 845 (Mar. 13, 1894), decided that a delay of two years, without good excuse, in bringing an action *in rem*, when the vessel has passed into the hands of a *bona fide* holder, will operate as a waiver of the lien. A decision to the same effect is to be found in the case of the *Asher W. Parker*, 84 Fed. 830 (C. C. A., 2d Cir.).

Salvage of Derelict, Care Required

It is a familiar rule that salvors must exercise care, good faith and absolute honesty with regard to property they save, this being particularly so in the case of derelict vessels. Therefore, while it may seem a hardship that they should have to pay for the loss of the boat which they have rescued, it is a necessary result. In the case of *Serviss* v. *Ferguson et al.*, 84 Fed. 202

ADMIRALTY (Continued).

(C. C. A., 2d Cir.), the salvors of a derelict barge negligently permitted her to sink in a slip to which they had towed her, and, in their absence, they having given no notice nor placed any buoy to mark the spot where the barge lay, she was crushed by a vessel moving about in the slip. Brown, J., after deducting one-third of the value of the barge to pay for their salvage services, held them liable for the balance. This decree was affirmed, *per curiam*, by the Circuit Court of Appeals.

Salvage, Value of Services

It is a difficult task for a judge to settle satisfactorily the value of salvage services, there are always so many facts to be considered. It was truly observed by Judge Goff in a recent case (*The Haxby*), 83 Fed. 715 (C. C. A., 4th Cir.), that "it is hardly safe to make comparison of cases of this character unless at the same time careful attention is given, and proper discrimination made, as to the facts and the special circumstances existing in each case. The dissimilar facts are generally so marked, especially those relating to value, time, risk and skill, as to render the decision in one case an unsafe guide in another."

In this case the "Haxby," a British steamship which had stranded on the Eastern Shore of Virginia, was rescued with comparatively little danger, in less than four days, by the use of tugs, cables, etc., belonging to the libellant, a wrecking company. The nearness of a life-saving station and the injuries received by the salved vessel were among the facts which influenced the court to reduce the award of the District Court from more than one-fourth to one-sixth of the value saved.

"Vessels," What Constitute

The case of the *International*, 83 Fed. 840 (D. C., E. D. Pa.), presents a novel question, it is believed. The "International," a large steam dredge, was imported from Canada and seized by the Collector of the Port of Philadelphia as subject to duty as "goods, wares and merchandise," under the tariff laws. The owners brought a possessory action, and it was contended in opposition to them that, while libels *in rem* have been sustained for the wages of men employed upon such dredges, those cases are really to be supported upon the character of the services involved, and are not authorities for the position that a steam dredge is a "vessel" within the meaning of the Acts of Congress. Butler, J., however, decided in favor of the libellant. The case has been taken to the Circuit Court of Appeals and elaborately argued. The decision of that court should furnish interesting reading.

The case of *Lawrence* v. *Flatboat*, 83 Fed. 200 (D. C., S. D.

ADMIRALTY (Continued).

Ala.), adds another to the list of cases which counsel in the *International* (*supra*) will have to succeed in distinguishing, in order to have the decree of the District Court reversed. It decides that a libel *in rem* is maintainable for the wages of men working on a flatboat fitted with a pile driver and used in constructing bulkheads for the erection of channel lights. Toulonin, J., after citing several cases, said: "It seems to me that the flatboat in this case should likewise be classed as a vessel rendering service in aid of commerce. She was capable of being navigated, and her business required her to be navigated from one place to another. When at work she drove piling and constructed bulkheads for the erection of lights to mark the channel of the bay in aid of navigation and commerce. Dredges and scows, though never used in the transfer of passengers or freight, and furnished with no motive power of their own, are vessels, and subject, as such, to maritime liens for service rendered." Counsel for the claimant evidently saw the weak point in his case when he contended that the service performed was not of a maritime character; but in this position he was opposed by a long line of cases, and his arguments were overruled.

ASSIGNMENTS.

Construction, Chattel Mortgage

It is a familiar principle in the law of assignments that any instrument or instruments which contemplate the purposes usually contemplated in an assignment shall be construed as an assignment, whatever legal form the transaction may take. In *Hargadine-McKittrick Dry Goods Co.* v. *Bradley*, 43 S. W. (Ind. Terr.) 947, this was applied to the case of a chattel mortgage, accompanied by an agreement or power of attorney, practically conferring upon the mortgagee the rights and duties of an assignee for creditors. As no provision was made for complying with the law governing assignments, the transaction was held void as against a subsequent judgment creditor of the mortgagor.

Power of Assignee, Control by Court

Smith v. *Cullen*, 51 Pac. (Wash.) 1040, holds (1) that though the law requires an assignment to be acknowledged, one who has actual knowledge of the assignment cannot complain that the assignment is illegal, and (2) that a clause permitting the assignee to sell on credit is ineffective, because the assignee, when once appointed, is subject to the control of the court.

ASSIGNMENTS (Continued).

An assignment for creditors everywhere passes title of the assigned property to the assignee, and in many states by statute the assignee is, besides, authorized to bring suits to set aside conveyances which are fraudulent as against creditors. Kansas is one of these states, and it has just been held there that the assignee is qualified also to bring suits to set aside preferences forbidden by law—the deduction naturally following that the creditors have no longer such a right of action, even though the assignee refuse to proceed, their remedy being an order of court for him to proceed or for his removal: *John Deere Plow Co.* v. *Emporia Bank*, 51 Pac. (Kan.) 892.

Right of Action by Assignee

ATTACHMENTS.

The only way in which a levy can be made under an attachment upon property capable of manual delivery is by the sheriff taking possession thereof; hence where a sheriff demanded of A the delivery of property of a defendant in attachment, A denying his possession, the sheriff at the same time delivering to A a certified copy of the warrant, and a notice of his intention to levy on the property and requiring him to deliver the same, and where later a receiver, appointed for the defendant, took possession of the property, an application to permit the sheriff to complete the levy was held to be properly denied: *Robinson* v. *Columbia Spinning Co.* (Supreme Court, App. Div.), 49 N. Y. Suppl. 4.

Sufficiency of Levy

BANKS AND BANKING.

The too common occurence of bank failures resulting from the disobedience by officers of the positive requirements of statutes, renders interesting such decisions as *Dunn* v. *O'Connor*, 49 N. Y. Suppl. 270. The bank had there lent to its president more than twenty per cent. of its capital and surplus in violation of Laws 1892, c. 689, § 25. It was held that the maxim in *pari delicto* did not apply, and that the bank was entitled to recover the amount of the loan and to enforce the mortgage given as security therefor.

Illegal Loan, Recovery

Independent District of Pella v. *Beard*, 83 Fed. (D. C. Iowa) 5, contains an exhaustive summary of the conflicting decisions relative to following trust funds in the hands of a receiver of a bank. After pointing out that it is impossible to reconcile the authorities as to the identification of a deposit of trust funds which have become

Insolvency, Trust Funds

BANKS AND BANKING (Continued).

improperly mixed with the general funds of the bank, Woolson, D. J., relieves himself of the difficulty by deciding that the Iowa rule, permitting the depositor to follow his fund, *being a rule of property*, must be followed in the United States courts. One cannot but ask (1) is such a rule a rule of property at all, and (2), if so, have not the United States courts wasted a large amount of legal learning over problems which might have been decided by a mere reference to the state decisions?

CARRIERS.

Non-Transferable Tickets

The Court of Civil Appeals of Texas, in *Levinson et al.* v. *Texas & N. O. Ry. Co.*, 43 S. W. (Tex.) 901, has decided that a ticket sold by a carrier at a reduced rate under an agreement that the same shall not be transferred, constitutes a binding contract, and a transferee of such ticket acquires no rights thereunder.

Passengers, Standing on Platform, Sick Passenger

The Supreme Court of New York, in *Montgomery* v. *Buffalo Ry. Co.*, 48 N. Y. Suppl. 849, decided that a conductor is justified in enforcing the rule of a railway company, prohibiting passengers from standing on the platform against a passenger, who stated that he was suffering from nausea, and might have to relieve himself by vomiting, and if the passenger refuses to comply with the rule and is ejected, he cannot recover for damages resulting from such ejectment, no unnecessary force having been used.

Railroad Tickets, Notice of Conditions

In the recent case of *San Antonio & A. P. R. Co.* v. *Newman*, 43 S. W. 915 (Court of Civil Appeals of Texas), a drover's pass was made out for two persons, a provision on the back of the pass limiting it to that number; but the agent of the company, at the request of the parties, inserted the name of a third person, informing them that all three might travel on the pass. The conductor of the train, on which the parties sought to ride, refused to allow passage to more than two, and was informed which two persons were in charge of the stock. One of these two "drew straws" with the third person to determine which one of them should ride, and, on losing, was ejected by the conductor. It was not shown that he had read, or knew of the limitation on the back of the pass. Held, (1) that he was not bound by such limitation; (2) that he did not forfeit his right to ride by the drawing, and that the company was liable for his ejection.

CONSTITUTIONAL LAW.

The Circuit Court of West Virginia, in *Butler* v. *White*, 83 Fed. 578, has recently decided (1) that the Act of Congress, known as the "Civil Service Act" is constitutional; (2) that by rule 3, § 1, the internal revenue service has been placed under said act and the rules made in pursuance thereof; (3) that gaugers and storekeepers in a distillery are officers of the government in the internal revenue service, and cannot be removed from their positions except for causes other than political; (4) that any attempt to change the positions and rank of these officers is in violation of law; (6) that a court of equity has jurisdiction to restrain the appointing power from removing these officers from their positions, if such removals are in violation of the Civil Service Act.

Civil Service Act, Who are Officers, Equity Jurisdiction

A state statute forbidding the employment of women in any saloon, beer hall, bar-room, theatre, or other place of amusement where intoxicating liquors are sold as a beverage, does not abridge the privileges and immunities of citizens, or deny to all the equal protection of the laws, within the meaning of the Fourteenth Amendment to the Constitution of the United States: *In re Considene* (Circuit Court of Washington), 83 Fed. 157.

Fourteenth Amendment, Employment of Women

A state statute providing that, on the making of an assignment by a debtor within ten days after the levy of an attachment, the attachment and levy shall be dissolved, and the property attached or levied shall be turned over to the assignee, impairs the obligation of contracts as applied to an attachment founded on an indebtedness contracted prior to the passage of the act, and is, therefore, unconstitutional: *Heath & Milligan Manuf'g Co.* v. *Union Oil & Paint Co.* (Circuit Court Wisconsin), 83 Fed. 776.

Obligation of Contracts

CONTRACTS.

An agreement was made between A and B, whereby B agreed to go into another state and locate placer mines, A to pay expenses and such expenditures as were essential in making the locations. After B had been at work some time he wrote to A that if they were dissatisfied with his progress he would return the full amount advanced. Held, that there was no consideration to support this promise and that A could not recover thereon: *Tamplin* v. *Hobson* (Court of Appeals of Colorado), 51 Pac. 1019.

Consideration, Sufficiency

CONTRACTS (Continued).

Personal Liberty

The Supreme Court of California has decided that a contract by a divorced husband to restore a daughter to the mother when she should reach the age of 18 years (that being the age at which a female attains majority), is void as infringing her personal liberty: *Dittrich* v. *Gobey et al.*, 51 Pac. 962.

Public Policy, Restraint of Competition

The city of Portland having advertised for bids to construct a pipe line by which the city was to be supplied with water, A and B entered into an agreement by which A bid for various parts of the work in the name of A & Co. B, with the knowledge and concurrence of A, made separate bids in the name of B & Co. They agreed in advance upon what parts of the work they should bid, upon what their respective bids should be, and upon what portion the bid of A & Co. should be the cheapest, and so arranged matters that the highest bid, as between themselves, should, if possible, be accepted, and they would divide the profits of the contract. The contract was awarded to A & Co. In a suit by B & Co. to recover its share of the profits from A & Co., the court held, reversing the court below, that the agreement tended to restrain the natural rivalry and competition of the companies in bidding for public work, and was against public policy and void: *Hoffman* v. *McMullen* (Circuit Court of Appeals, Ninth Circuit), 83 Fed. 372.

CORPORATIONS.

Abatement of Action, Dissolution

The Supreme Court of New York, in *In re Directors of Yuengling Brewing Co.*, 49 N. Y. Suppl. 12, decided that unless provision is made by statute the common law rule prevails, and an action for personal injuries does not survive the dissolution of the corporation, and the court cannot authorize the continuance of the action against the receiver.

Borrowing Powers of Vice President of Bank, Knowledge of Directors

These are days in which many frauds are committed by bank officials upon their institutions and, through them, upon the depositors and the public. There is therefore an especial interest attaching to decisions bearing upon the powers and liabilities of such officers. In *Armstrong* v. *Chemical Nat'l Bank*, 83 Fed. 556, the Circuit Court of Appeals, Sixth Circuit, has rendered an interesting decision to the effect that a vice president binds his bank for a loan negotiated in its name but used

CORPORATIONS (Continued).

for his own purposes with the knowledge of a minority and through the supineness of a majority of the board of directors. The directors in Cincinnati committed to their executive officers authority to conduct business with a New York correspondent were treated as bound by the usage which in New York invests such officers with apparent authority to borrow. Such a usage the court thought not unlawful under the decision in *Western Nat'l Bank* v. *Armstrong*, 152 U. S. 346 (1893), inasmuch as that decision was predicated upon an absence of special authority while here the usage assumed the conferring of such authority.

Franchise Tax, "Capital Within the State"

The New York Court of Appeals has at different times declared that the capital of a foreign corporation employed within the state is represented by the actual value of its property within the state, whether in money or goods or other tangible things, less the amount which may be deemed income or profits. Upon this principle it was decided by the Supreme Court, Appellate Division, in *People ex rel., etc.*, v. *Roberts, Comptroller*, 49 N. Y. Suppl. 10, that an Iowa corporation was subject to a franchise tax under the Act of 1896, c. 908, §182, in respect of securities sent to its New York office for sale, the proceeds being returned to its offices in other states for reinvestment. The court accordingly took into consideration the corporation's bank account, the amount paid out for salaries and rentals and the average amount of securities held and used in the state: *People* v. *Roberts*, 154 N. Y. 1 (1897), was distinguished.

Insolvency, Trust Funds

In spite of the limitations recently placed by the United States Supreme Court upon its favorite trust fund theory, this is still enunciated from time to time by the state courts as an existing and useful doctrine, though with perhaps an increasing tendency to restrict its operation and effect. In its palmiest days and among its avowed supporters it has always been a doubtful question whether the doctrine forbids a corporation to prefer its creditors by judgment or mortgages when on the verge of insolvency. In *Farwell Co.* v. *Sweetzer*, 51 Pac. (Col.) 1012, such preference was held valid, the court holding that the theory only applies as between creditors and stockholders, and does not prevent a corporation, like a private individual, from paying which of his creditors he chooses. Thus construed, the trust fund theory seems to retain little of its original force and vitality.

CORPORATIONS (Continued).

Pledgee of Stock, Attachment

The Court of Civil Appeals of Texas, in *Tombler* v. *Palestine Ice Co.*, 43 S. W. 896, has definitely approved of the rule which gives to an unregistered pledgee of stock priority over a subsequent attaching creditor of the pledgor. Earlier Texas decisions, beginning with *Strange* v. *Railroad Co.*, 53 Tex. 162 (1880), had tended in the same direction, and this jurisdiction may now be looked upon as in line with Pennsylvania, New Jersey, New York, South Carolina, Kentucky, Minnesota, Louisiana and the Federal Courts. The conclusion reached by the court is undoubtedly sound. The endorsement and delivery of the stock certificate operates as an equitable assignment of the shares, and, as the attaching creditor is not a purchaser for value, he takes in subordination to the equities of the assignee. See "The Compulsory Duplication of Stock Certificates," by E. A. Harriman, 36 Am. Law Reg. & Rev. (N. S.) 81; Cook on Stock and Stockh., § 487; "The Creation and Transfer of Shares in Incorporated Joint Stock Companies," by C. C. Langdell, 11 Harv. Law Rev. 536.

DAMAGES.

Mental Anguish

The doctrine that damages may be recovered for mental pain and anguish caused by negligent omission to deliver a telegram, unaccompanied by physical injury, which has been adopted in Texas, Kentucky North Carolina, Tennessee, Alabama and several other states, has been repudiated in *Peay* v. *Western Union Tel. Co.* (Supreme Court of Arkansas), 43 S. W. 965. (See note in this issue.)

EVIDENCE.

Competency of Witness, Ignorance

The Supreme Court of Louisiana, in *State* v. *Washington*, 22 So. 841, decided that in an indictment for rape the prosecutrix, a mulattress of seven years of age, was incompetent as a witness, since it appeared upon her *voir dire* examination that "she has no knowledge of God, 'never heard of the devil or the bad man or what should become of her if she told a lie' and had no knowledge of an oath." It was contended that a statute declaring that "in criminal prosecutions the competent witness is a person of proper understanding" had removed the common law requisites, but the contention was not sustained.

In *Wolf* v. *DiLorenzo*, 49 N.Y. Suppl. 191, the question in

EVIDENCE (Continued).

Parol Evidence, Written Contract, Res Gestæ

dispute was an item of $17.50 which did not appear in the written lease from an installment dealer in furniture to his purchaser. At the time of the sale and the execution of the lease the dealer drew up a memorandum of the transaction which he gave to the purchaser. This contained the item in question but the dealer objected to it as evidence since the transaction was contained in the written lease. Held, that the memorandum was admissible against the dealer as part of the *res gestæ*.

Parol Evidence to Vary Terms of Written Contract, Admissability

The United States Circuit Court of Appeals for E. D. Wisconsin, in *Godkin* v. *Monahan*, 83 Fed. 116, has expressly differed from the decision of U. S. C. C. of Appeals for E. D. of Pa. upon the rule of law stated and applied by the latter court in *The Pokonoket*, 28 U. S. App. 600 (1895), a case which attracted some attention at the time it was decided. In the "Pokonoket" a written agreement provided for the purchase of a vessel, to be paid for as the construction progressed, without any provision as to when title was to pass. The builder failed, and his interest in the vessel was sold, with full notice of respondent's claim, to the libellant, who attempted to recover the unfinished vessel from the purchaser. The latter, to maintain his title, offered to prove that, during the negotiation prior to the making of the written contract, it was agreed that title should pass to the purchaser at once, and that, in consequence of this agreement, the security for completion given by the builder should be $25,000 instead of $50,000. This evidence was admitted by the trial judge, and was absolutely uncontradicted. The court state the law to be that, in the absence of parol evidence, the contract would unquestionably be construed as leaving the title in the builder, and bases its ruling as to the evidence upon a number of Pennsylvania decisions, which fully sustain the position, and admit the evidence (1) because the testimony did not contradict the written contract, but was entirely consistent therewith, and treated of a collateral matter not covered thereby—in other words, the writing did not contain the whole agreement; (2) because under the circumstances of this case it would be a fraud upon the rights of the purchaser to allow the libellant, standing in the shoes of the builder, to evade the agreement in this manner. Upon appeal the judgment was sustained upon the authorities cited, with the addition of several

EVIDENCE (Continued).

other English and American decisions. This case is attacked in the Appellate Court of the Wisconsin Circuit as unsound, when, after ruling that where such a contract is silent as to title—by the law in this country title is in the builders—it "held that the parol agreement, with respect to the title, was collateral and independent, and could be given in evidence." The lower court admitted the evidence upon the rulings of the Supreme Court of Pennsylvania, which court has gone to an extreme in the admission of evidence to vary written agreements. The Court of Appeals affirmed the decree upon the strength of those decisions, and of certain other cases cited, notably certain English cases, which are reviewed and disapproved in *Naumberg* v. *Young*, 44 N. J. Law, 331 (1882). The law as it existed when the contract was signed was an integral part of the contract, and it could not have been altered as to this term by subsequent legislation. They therefore maintain that the law annexed a term to the contract which could not be contradicted by parol evidence, citing *Van Winkle* v. *Crowell*, 146 U. S. 42 (1892).

Having thus repudiated the ruling in "The Pokonoket," they apply the strict ruling to the contract then before them. The plaintiff had contracted with the defendant "to cut and deliver in the Wisconsin river all . . . pine timber . . . on N. ½ sec. 31 . . . to cut and skid all . . . timber, and to have all logs banked on the Twin river on or before 20 Mch., 1893." The question of evidence which arose was whether the plaintiff could prove that the defendant had agreed to obtain the banking place upon the Twin river. The trial judge had admitted the testimony and left it to the jury to find who had agreed to furnish the banking place, and for this reason the judgment was reversed, the court saying at page 121: "The law implies, as a term of the contract, that he (plaintiff) was to do all things needful to complete delivery in the Wisconsin river; and such banking being necessary in the progress of delivery, it became a term of the contract that he should supply the means of banking the logs."

The decisions in these two cases from courts of equal authority seem to be diametrically opposed in principle. "The Pokonoket," to be sure, is a stronger case, and presents a case of greater hardship; but, had the other ruling been adopted, the evidence would never have been admitted, and the extent of hardship or constructive fraud never could have been brought to light. It may be, however, that the Pennsylvania doctrine admitting such evidence, which has been fostered and

EVIDENCE (Continued).

developed in courts administering the doctrines of equity in all proceedings, is sound when applied in an admiralty proceeding, and unsound when applied in a suit at common law in a Federal court, such as *Godkin* v. *Monahan*.

HUSBAND AND WIFE.

The peculiarity of community property, like that of partnership property which it resembles in so many particulars, is that it is a fund primarily liable for the payment of debts of the community. It follows that one member of the community can assert no rights against it, until all community debts are paid. So decided in *Ghent* v. *Boyd*, 43 S. W. (Tex.) 891, where the wife, who in divorce proceedings had obtained a money decree against her husband for using an excess of his half of the community property, was postponed as to that property to a subsequent judgment creditor of the community.

Community Property, Separate Debts

While it is perfectly well settled that the status of marriage cannot be annulled by reason of ordinary misrepresentations which might afford ground for setting aside an ordinary contract, yet modern authorities are more and more coming to a recognition of the fact that fraud with respect to the essentials of marriage is ground for annulling the same. Just what constitutes such fraud is not easy to define. *Reynolds* v. *Reynolds*, 3 Allen, 605 (1861), is the forerunner of several decisions that the concealment by a woman at marriage of the fact that she is at the time pregnant by another man than her husband is such ground. An *Anonymous Case*, 49 N. Y. Suppl. 331, suggests that the principle may be carried a step further: The referee there reported in favor of an annulment because the man had prior to marriage represented to the woman that he was in good physical health, whereas he knew at the time that he was afflicted with a chronic and contagious venereal disease.

Marriage, Annulment for Fraud

Deane v. *Aveling*, 1 Rob. Ecc. 279 (1845), is usually cited as authority for the proposition that it is capacity for copulation and not of procreation that the law regards. The reasoning, however, is not satisfactory, and we are disposed to agree rather with the decision in *Wendel* v. *Wendel*, 49 N. Y. Suppl. 375, where a husband was held entitled to an annulment for the reason that his wife, by reason of a surgical operation, had been rendered incapable of bearing children.

Marriage, Annulment for Impotency

INSOLVENCY.

Receiver, Preferences

Fosdick v. *Schall*, 99 U. S. 235 (1878), and its successors, have established beyond dispute the rule that, upon sale of an insolvent railroad's property, certain claims may be paid out of the fund in preference to the first mortgage debt. The difficulty is to determine just what character of claims are entitled to this preference, and just when they must have been contracted. *New York Guaranty Co.* v. *Tacoma Railway Co.*, 83 Fed. 365, is an authority upon both these points. It was there held that a cable, being necessary to keep a cable road up as a going concern, was entitled to preference, though no diversion of income was proved; and further, the now discarded six months' rule being abandoned, a lapse of two years between the date of sale and appointment of a receiver was held not to bar the claim.

MORTGAGES.

After-Acquired Property

Durham v. *Rwy. Co.*, 1 Wall. 254 (1863), is, perhaps, the earliest case in which it is pointed out that, whereas a railroad company may, with reference to its rolling stock and moveable personalty generally, by means of car trusts, conditional sales or otherwise, create liens in favor of the vendors superior to that of a bondholder secured by a mortgage containing the usual after-acquired property clause, yet so far as its necessary real estate, as stations, tracks, etc., are concerned, no claim of the builders can rise higher than that of creditors thus secured. *Phœnix Iron Works Co.* v. *New York Security and Trust Co.*, 83 Fed. 757, reiterates this rule, applying it to machinery which constituted the steam plant and motive power of a street railroad.

Assumption by Purchaser

The disposition of the courts is increasingly against holding a purchaser personally liable for an existing mortgage debt, except upon very clear evidence that he intended to assume the same. So in *Ordway* v. *Donney*, 51 Pac. (Wash.) 1047, while admitting parol evidence of its assumption, the Supreme Court reversed the court below for finding in favor of the assumption simply upon the unconfirmed and contradictory evidence of the parties.

MUNICIPAL CORPORATIONS.

Authority to Issue Bonds

An act of legislature conferring upon a city the power "to borrow money upon the faith and credit of the city" does not confer any power to issue negotiable bonds; and bonds issued under supposed authority of such

MUNICIPAL CORPORATIONS (Continued).

act are void in the hands of *bona fide* holders: *Lehman* v. *City of San Diego* (Circuit Court of Appeals), 83 Fed. 669.

Municipal Corporation, Creditor's Bill

It seems to be moderately well settled that a creditor of a municipal corporation cannot split up his claim by assigning portions of it to different persons. This survival of "the rule in *Mandeville* v. *Welch*" (5 Wheat. 277, 1820), is said to rest upon considerations of convenience from the point of view of a municipality as a public agency. See *Appeals of City of Phila.*, 86 Pa. 179 (1878). Upon a similar principle it is held that a municipal corporation is not liable to the process of garnishment: *Merwin* v. *Chicago*, 45 Ill. 134 (1867). The Supreme Court of Illinois, after citing all the garnishment cases, has extended the rule so as to exempt a municipality from suit by creditor's bill, in which the end sought to be attained is substantially the same as garnishment: *Addyston Pipe & Steel Co.* v. *Chicago*, 48 N. E. 967.

NEGLIGENCE.

Duty of a World's Fair Company

The United States Circuit Court, in *French Republic* v. *World's Columbian Exposition*, 83 Fed. 109, decided that the management of a world's fair must use the highest intelligence and protection in guarding the exhibits of the other nations they invite to participate in the enterprise. This duty continues after the close of the fair, until the exhibitors have had a reasonable opportunity to remove their wares, and this duty cannot be avoided by promulgating regulations, that the exposition company will not be responsible for loss or damage. The fair company, after the fair closed, failed to keep water at hand whereby the buildings could be water-soaked, and consequently when the fire broke out the French exhibits were damaged before the fire was gotten under control, for which the fair company was held responsible.

Fellow Passengers

The Court of Civil Appeals of Texas, in *Dumas* v. *M., K. & T. Ry. Co.*, 43 S. W. 908, decided that where a woman attempted to raise the car window, and failed, and a fellow passenger of his own motion raised it for her, but not far enough to reach the catch, whereby it fell upon her hand, which she had placed upon the sill without looking to see how far the window was raised, cannot recover from the company, as it was not liable for the passenger's act.

NEGLIGENCE (Continued).

Steamship, Injury to Passenger, Remote Cause

A very far-fetched claim and one which was rightly dismissed was that presented in the case of *The Anchoria*, 83 Fed. 847 (C. C. A., 2d Cir.). The following statement of facts by the district judge was quoted by Shipman, circuit judge, in delivering the opinion of the court: "On the evening of September 22, 1894, about 8 o'clock, the libellant's son, about three years of age, a passenger, with his father and mother, on board the steamer "Anchoria," from Londonderry to this port, while sitting on the starboard side of the starboard table in the steerage, near the forward end, at his evening meal, was scalded upon the face and neck by the splashing of hot gruel from the bucket in which the steward was supplying it to the steerage passengers." The cause of the accident was not exactly clear, but the evidence went to prove that the steward slipped upon a wet place on the floor, resulting from the passengers' careless use of the water cooler. This was held to be a danger so remote as not to be evidence of negligence, —a reasonable disposition of the case.

Powder Car in Warehouse

A railroad company owned a warehouse, in which it kept the property of its patrons for a reasonable time until it should be called for. The company allowed a car marked powder—which was, in fact, empty, but locked—to be placed in close proximity thereto. The warehouse caught fire and was destroyed, because the firemen were prevented, through reasonable fear of the powder car, from extinguishing the fire. On this state of facts the United States Circuit Court of Appeals, in *Hardman* v. *Montana Union Ry. Co.*, 83 Fed. 88, decided that the company was liable to the owner of goods which were destroyed in the warehouse.

NEGOTIABLE INSTRUMENTS.

Bill of Exchange, Dishonor, Due Notice to Endorser

In *Fielding & Co.* v. *Corry* [1898], 1 Q. B. 268, the Court of Appeal in England has decided an interesting question as to what constitutes due notice of the dishonor of a bill to an indorser so as to prevent a discharge of a prior indorser upon the ground that there has been a prior breach by any one of the parties required to give notice. (See *Turner* v. *Leech*, 4 B. & Ald. 451 (1821); *Etting* v. *The Schuylkill Bank*, 2 Pa. 355 (1845).) Mr. Justice Smith stated the facts as follows: "The plaintiffs had a bill of exchange, which they handed

NEGOTIABLE INSTRUMENTS (Continued).

to the Cardiff branch of the County of Gloucester Bank, which is a banking company having branches at different places. The Cardiff branch sent the bill to their London agents, the London and Westminster Bank, by whom it was presented for payment in London on Saturday, November 10, 1894, and it came back into their hands in the afternoon, so that they had until Monday, November 12th, to give notice of dishonor, and on that day they sent notice. By mistake that notice was sent to the Cirencester branch of the County of Gloucester Bank, and not to the Cardiff branch. On the morning of Tuesday, November 13th, the London bankers had discovered the mistake, and they telegraphed to the Cardiff branch, giving them notice that the bill was dishonored. What happened after this was that due notice was given in succession by the Cardiff branch, and then all the way down the line of indorsers till the defendant, who now appeals, was reached, though she got notice of dishonor in due time."

Justices Smith and Rigly held that the written notice sent to the Cirencester branch was a mistake in the address of the bank, which mistake was rectified by the telegram on the 13th. Mr. Justice Collins dissented upon the ground that, for the purpose of giving and receiving notice of dishonor, the different branches of a bank are treated as different persons (*Clode* v. *Bayley*, 12 M. & W. 51, 1844), and therefore the delay in notifying the Cardiff branch was not helped by the notice sent to the Cirencester branch.

It is submitted, in reference to the opinion of Mr. Justice Collins, that the case of *Clode* v. *Bayley* (*supra*) only decides that when the bill is forwarded for collection through different branches, then each branch is considered a separate indorser and entitled to due notice.

PARTNERSHIP.

Partner's Equity, Transfer by Firm to Remaining Partner

A partner is liable to firm creditors, both as respects the firm estate and his separate estate. For the relief of his separate estate he has a legal right to compel the appropriation of firm property to the payment of firm debts. The sequestration of this right in the interest of firm creditors results in the creation of a joint estate, to which such creditors have a legal right of prior recourse. "The partner has more than an equity and the firm creditor more than a lien." Hence, if firm property is given away without consideration,

PARTNERSHIP (Continued).

the firm creditor may, if the firm is insolvent, set the transfer aside. The covenant of a remaining partner to pay the firm debts is not a valuable consideration if he is insolvent, and the result is not affected by the circumstance that the parties act in good faith in the belief that they are solvent. This sound conclusion (differing from *Howe* v. *Lawrence*, 9 Cush. 553, 1852), is reached by the Court of Appeals of Maryland in *Franklin Sugar Ref'g Co.* v. *Henderson*, 38 Atl. 991. Unfortunately, however, the court seems to adhere to the untenable position that the "partner's equity" is founded upon an interest instead of a liability.

Assumption of Firm Debt by Successor Corporation

A sues B, C and D as partners to recover a firm debt. B and C seek to escape unlimited liability by setting up a statutory partnership agreement whereby B and C became special partners of D, the general partner. As to B, however, it appears that the articles were subscribed by an attorney-in-fact, whose authority to act for B is not shown. Under such circumstances B cannot avail himself of the statutory limitation. But B also contends that the firm subsequently became incorporated, that the corporation assumed the debts of the firm and that A has proved for his debt in the insolvency of the corporation and has received a dividend. A, however, is not bound by the corporation's assumption without an assent, express or implied. Mere proof of claim and receipt of partial payment is not conclusive. Whether there has been a discharge of the firm by a is a question for the jury. Such is the undoubtedly sound decision of the Supreme Court of Illinois in *Walker* v. *Wood*, 48 N. E. 919.

QUASI-CONTRACTS.

Money Paid Under Mistake, Recovery, Mistake of Law

The Supreme Court of New York, in *Gillig* v. *Grant*, 49 N. Y. Suppl. 78, has permitted a recovery of money paid to a receiver under a mistake of law, upon the ground that a receiver is an officer of the court; and, therefore, the general rule forbidding a recovery for money paid under a mistake of law has no application. Such was the doctrine of *Ex parte James*, 9 Ch. App. 609 (1874), where the money was paid to a trustee in bankruptcy; for, in the opinion of Lord Justice James, "the Court of Bankruptcy ought to be as honest as other people, and should set an example to the world by paying it to the person really entitled to it." See also *Ex parte*

QUASI-CONTRACTS (Continued).

Simmonds, 16 Q. B. Div. 308 (1885). Should not a court of law set the most practical lesson of all, viz., abolishing the distinction between money paid under a mistake of law and a mistake of fact, and permit a recovery where it is the duty of the defendant to make restitution? The Supreme Court of the United States has affirmed the right of a chancellor to cancel or reform an instrument, executed under a mistake of law, when in his opinion *it is equitable to do so*: *Griswold* v. *Hazard*, 141 U. S. 274 (1890). The test thereof is not stated in the opinion.

REAL PROPERTY.

Covenant Running with Land, Lease, Assignment, Assignee's Liability

The question of covenants running with the land recently arose in an interesting case decided by the U. S. Circuit Court of Appeals, Sixth Circuit. Defendants, a paper manufacturing company, leased their land to one F, with privilege of purchase by him within a stipulated time, when they were to "convey to him by a good and sufficient warranty deed." F covenanted in the lease that he would not carry on the business of paper making for twenty years. He afterwards assigned all his interest to plaintiffs, and defendants agreed to the assignment in writing. Then plaintiffs tendered the purchase money to defendants and demanded a deed of conveyance, but they were met by a refusal unless they would agree to a stipulation relative to the manufacture of paper on the premises, similar to that contained in the lease to F. This action was brought for the breach of covenant to convey.

The court easily disposed of the objection that this was a contract in restraint of trade, since the restraint was but partial both as to place and time, in which case such a condition will be upheld. The main argument of plaintiffs was that the stipulation in the original lease to F did not bind them, since it did not mention the assignees of F; but the court held that the covenant ran with the land, and that the plaintiffs could not escape its burden.

"The restriction is, therefore, not upon F personally, but upon the property . . . . That 'assigns' is not used in the words of this covenant is not of moment. It is well settled, by the weight of authority, that a covenant by a lessee against the use of the premises in a particular way, or in a particular trade, attaches to the subject of the demise and runs with the leasehold, whether the assignee be named or not. The covenant concerned a thing *in esse* and related to the use

REAL PROPERTY (Continued).

of the demised premises, and is, therefore, not collateral to the land. It did not relate to something which was not 'in being at the time,' and clearly falls within the first and sixth resolutions of *Spencer's Case*, 5 Co. 16 (1583); *Am. Strawboard Co.* v. *Haldeman Papee Co.*, 83 Fed. 619."

Mechanics' Lien, Discharge

The Circuit Court of Appeals of Nebraska, in the case of *Reynolds* v. *Manhattan Trust Co.*, 83 Fed. 593, has decided that a mechanics' lien is not discharged by a receipt given for subscriptions of stock, the contract for the transfer of which had at the time become impossible to perform. The plaintiffs had entered into a contract with the Wyoming Pacific Improvement Company for the construction of a portion of a railroad. Of the debt thereby created a balance of $13,500 was due to the plaintiffs, to secure which a lien had been recorded against the portions of the road completed by them. The plaintiffs were induced to give a receipt for the amount of the lien by promises of the Improvement Company to give in payment certain subscriptions of stock and bonds of the Nebraska and Western Railway Company. Meanwhile the Improvement Company had become insolvent, so that its stock and its promises were alike worthless, and it had disabled itself from performance of the subscription contract by pledging all the railway bonds it was entitled to receive to secure advances it could never repay. The court were of opinion that this act of the Improvement Company was in itself a repudiation of the subscription contract, and it had already given to the plaintiffs the right to accept this action as a rescission of the contract.